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SUPREME COURT, U.S.

76-5403

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-5403

CURFEW DAVIS, Petitioner

v.

STATE OF GEORGIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-

CURFEW DAVIS, Petitioner

v.

STATE OF GEORGIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered on April 15, 1976, rehearing denied May 6, 1976.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 236 Ga. 804, 225 S.E. 2d 261 (1976) and is set our in Appendix B hereto, pp. 16-116, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on April 15, 1976 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the concededly improper exclusion of one

venireman in a death penalty case required reversal of the sentence by the court below.

2. Whether the transcript below showed plainly that more than one venireman was improperly excluded as the result of questions about scruples concerning the death penalty which failed to meet the Witherspoon standard.

3. Whether the voir dire transcript's incompleteness and the trial court's amendment thereof were unconstitutional denials of petitioner's right to effective counsel and due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provision of the Code of Georgia:

Georgia Code Annotated §6-805(d)(f)(1965)

STATEMENT

On July 19, 1974, at approximately 1:30 p.m., Ann Starnes was seen as she picked up medical specimens at The Woman's Clinic in LaGrange, Troup County, Georgia, to carry to a laboratory in Columbus, Muscogee County, Georgia (T-46,47) She was, apparently, never seen alive again. Her disappearance was unsolved until August 28, 1974, when Curfew Davis, the petitioner, carried various officers to a location in the eastern part of Troup County where the remains of a body were found. The remains are alleged to be the remains of Ann Starnes. (Indictment, T-48,49,70-72, 89, 93-100)

The case received much pretrial publicity, with the defendant originally being charged and entering a plea

of guilty to the theft of the automobile driven by Ann Starnes. (T-10JC, Newspapers)

No witness for the state testified to seeing petitioner with the deceased Ann Starnes at any time or place. The only connection between the petitioner and the body was the petitioner's leading the officers to the body. (T-70-72) The petitioner did not testify at the trial.

At the trial a voir dire was conducted of 53 veniremen. (Transcript, 1-43; Appendix C pp. 1c-43c). Questioning of only eleven of the first panel of twelve veniremen is reflected in the transcript, (T., 1-12) so that questioning of only fifty-two of the fifty-three veniremen is transcribed; twelve panel members from each of the second, third and forth panels and five from the fifth. (T. 1-43)

Six jurors were dismissed over petitioner's objection for expressions of scruples concerning imposing the death penalty. (Juror Lamb T.-4; Juror Cotten T.-15; Juror Bankston T.-16; Juror Gray T.-18; Juror Lucan T.-29-30; Juror Meacham T.-30.)

Eight months after the trial the state moved to correct the voir dire transcript over objection by petitioner's trial counsel. (Record 106, 108-109; Appendix C pp. 44c - 47c)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. During selection of petitioner's jury, defense counsel made objections to the exclusion of six veniremen for cause on account of their conscientious scruples against the death penalty. (T.-2,3,15,16,18,30.)

In the court below, petitioner's Enumeration of Error asserted:

> 1. The Court erred in excluding potential jurors who stated that they had conscientious objections to capital punishment.
> 2. The Court erred in overruling the defendant counsel's objections to the exclusion of these jurors.

This issue was briefed and rejected by a majority of the Supreme Court of Georgia, Davis v. State 236 Ga. 804, (1976). Petitioner again raised this issue in §5 of his rehearing petition, but this petition was denied.

II. In support of a timely rehearing petition, petitioner urged the following grounds:

> 4. The Court erred in finding that each juror excused for cause on the ground that he was conscientiously opposed to capital punishment stated that he would not vote for the death penalty under any circumstances, when the record shows this not to be the fact.

The rehearing petition was denied.

III. In the Court below, petitioner's Enumerations of Error asserted:

> 3. The record of the proceedings held before the Superior Court of Troup County, Georgia, does not reflect the voir dire examination of the jurors as regards questions relating to the imposition of the death penalty under the rulings of Witherspoon v. Illinois, 291 U.S. 510, as adopted by the Supreme Court of the State of Georgia in Owens vs. The State, 233 Ga. 869, decided February 12, 1975, and in Ross vs. The State, 233 Ga. 361, decided November 18, 1974, in The Supreme Court of the State of Georgia.
> 11. The Court erred in issuing its order of August 8, 1975, which attempts to correct the transcript in this case inasmuch as the same is in violation of the law as set forth in the case of Owens vs. The State, 233 Ga. 869, decided February 12, 1975.
> 12. The Court erred in issuing its order of August 8, 1975, inasmuch as it is not a "correction" of the transcript, but is in effect a rewriting of the transcript, the court reporter having no notes other than as originally transcribed, said notes being the highest and best evidence of the proceedings.
> 13. The provisions of Section 6-805 of the Georgia Code Annotated does not diminish the requirement that all proceedings be transcribed in this matter.

This issue was briefed and rejected by a majority of the Supreme Court of Georgia, Davis v. State, 236 Ga. 804, (1976). Petitioner again raised this issue in §3 of his rehearing petition, but this petition was denied.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

During the voir dire of the venire, the court excused six veniremen for cause on the ground of their opposition to the death penalty. The first of these excused veniremen was excluded on the basis of the following examination:

> THE COURT: Are any of you conscientiously opposed to capital punishment?
> JUROR LAMB: Yes.
> MR. FLEMING [The District Attorney]: You are?
> JUROR LAMB: Yes.
> MR. FLEMING: They're qualified, your Honor.
> MR. WELDON [Defense counsel]: Your Honor, I object to that. We have a right to a fair and impartial jury just because he's opposed to capital punishment, I mean, capital felony. We've got a man that's got just about as much right to a fair trial as anybody else.
> THE COURT: Well, -
> MR. FLEMING: (Responding). Your Honor, please, I consider that as an improper statement. The fact that a person opposes capital punishment or believes in capital punishment doesn't make them fair or impartial, one way or the other. The Witherspoon case very clearly holds that if a person withunder no circumstances go for it be instructed (sic).
> THE COURT: Have you got your objections, Mr. Weldon, for the record?
> MR. WELDON: (Responding.) Yes, I feel that this Juror should be allowed to remain, assuming that she's, that would be fair and imparital towards both sides, and the fact that she's opposed to capital punishment should not disqualify her (sic).
> THE COURT: Alright, Mr. Weldon. Disqualify the jury for cause. Come out of the jury box, please. (T. 3-4.)

The second of these excused veniremen was excluded on the basis of the following examination:

> MRS. TRAYLOR: (The Clerk) Virgil Matthews Cotten.
> JUROR: Virgil Matthews Cotten. (standing)
> THE COURT: Have a seat, Mr. Cotten.
> JUROR: Yes sir.
> MR. FLEMING: Mr. Cotten, are you conscientiously opposed to capital punishment, sir?
> JUROR: Yes sir.
> MR. FLEMING: Would you vote for it under any conditions?
> JUROR: No sir. I would not.
> THE COURT: Excuse the juror for cause. (Call the next one, Mrs. Traylor.) Do you want to put in an objection in the Record, Mr. Weldon?
> MR. WELDON: Yes sir, Judge. I object to him being excused. We need people of all ideas to show that they're fair and impartial.
> THE COURT: I'll overrule the objection. (T. 14-15.)
> (Mr. Cotten was then excused.)

The third of these eliminated veniremen was excused on the basis of the following:

> JUROR: Ethel Bankston.
> MR. FLEMING: Mrs. Bankston, you've heard any, or my questions to the other jurors on the panel here. Are you conscientiously opposed to capital punishment?
> JUROR: No.
> (Mr. Fleming propounded individual questions to the juror on hand.)
> MR. WELDON: I object to that.
> MR. FLEMING: Now, your Honor, -
> THE COURT: Alright. The juror is excused for cause. Overrule the objection. Call the next juror, Mrs. Traylor.
> MR. WELDON: I object to that on the grounds because it would be impossible to select a fair and impartial jury.
> THE COURT: I'll overrule the objection. (T. 16-17.)
> (Mrs. Bankston was then excused.)

The fourth of these excluded veniremen was excused on the basis of the following examination:

> JUROR: C.L. Gray.
> THE COURT: Alright, Mr. Fleming. Go ahead.
> MR. FLEMING: Yes sir. You heard me ask those other people questions.
> (Mr. Fleming propounded individual questions to the Juror at this time.) Do you believe in capital punishment?
> JUROR: No sir.
> MR. FLEMING: Regardless of what the evidence was you would never vote for the death penalty?
> JUROR: No sir.
> MR. FLEMING: Alright. We ask that he be excused, your Honor.
> MR. WELDON: I object to it on the same grounds.
> (T. 17-18.) (Mr. Gray was then excused.)

The fifth of these excluded veniremen was excused on the basis of the following examination:

> JUROR: Ledria Lucan.
> MR. FLEMING: Do you believe in capital punishment?
> JUROR: No sir.
> MR. FLEMING: I beg your pardon?
> JUROR: No, I don't.

MR. FLEMING: If the evidence in this case satisfied you, would you vote for it?
JUROR: No sir, I wouldn't.
THE COURT: Alright, Mr. Weldon, your juror.
MR. WELDON: Did you read about this in the newspapers?
JUROR: Yes sir.
MR. FLEMING: Now, -
MR. WELDON: How's that?
JUROR: Not too much.
(Continued propounding questions to the Juror.)
THE COURT: I believe we're going to have to excuse that Juror for cause, Mr. Weldon. (T. 29-30.).
(Ledria Lucan was then excused.)

The sixth of these excluded veniremen was excused on the basis of the following examination:

JUROR: Mrs. Walter Meacham.
MR. FLEMING: Mrs. Meacham, are you opposed to capital punishment?
JUROR: Yes sir.
MR. FLEMING: You would not vote for it?
JUROR MEACHAM: No, I would not.
THE COURT: Excuse the Juror for cause.
MR. WELDON: I want to interpose the same objection for the Record, your Honor. (T. -30.).

In affirming the conviction and death sentence the Georgia Supreme Court found only one of the above exclusions to be improper.

> "With one exception, each juror excused for cause on the ground that he was conscientiously opposed to capital punishment stated that he would not vote for the death penalty under any circumstances." (Opinion below, at 807.)

The Georgia Supreme Court recognized that Juror Lamb had been improperly excluded and that "... the examination of this juror as indicated by the reporter's transcript is inadequate under Witherspoon v. Illinois, 391 U.S. 510 (88 S.C. 1770, 20 L.Ed. 2d 776) (1968), as amplified in Boulden v. Holman, 394 U.S. 478 (89 S.C. 1138, 22 L.Ed. 2d 433) (1968), and Maxwell v. Bishop, 398 U.S. 262 (90 S.C. 1578, 26 L.Ed. 2d 221) (1970), "Id, at 808, but went on to hold the inadequate examination to be an enumeration of error without merit. Id., at 810. That holding above

presents an issue which should be determined by this court, as is discussed infra.

But it is also clear that the Supreme Court of Georgia failed to recognize that the test of exclusion used below did not meet the minimum standards of the Sixth and Fourteenth Amendments to the constitution of the United States regarding juror exclusion on the basis of opposition to the death penalty.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court held that veniremen who express general objections or conscientious or religious scruples against the death penalty, cannot be excluded for cause unless the veniremen make it:

> ...unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Id., 522-23. n. 21.

This Court based its holding upon the defendant's Sixth Amendment right to an impartial trial and the Fourteenth Amendment's incorporation of that right in state trials, citing Turner v. Louisiana, 379 U.S. 466, 471-473 (1965), Irvin v. Dowd, 366 U.S. 717, 722-723 (1961), Glasser v. U.S., 315 U.S. 60, 84-86 (1942).

The examinations of the six veniremen excused for cause on the basis of their opposition to the death penalty were inadequate under the Witherspoon test. The veniremen were not asked if they could consider all the penalties and could perform their duties as jurors under oath to obey the law of the state. Boulden v. Holman, 394 U.S. 478 (1969). The veniremen were not instructed as to their dual

role of determing guilt and sentence separately, so they might express whether their opinions would interfere with a determination of guilt, nor were they asked if their opinions would interfere with a determination of guilt. The excluded veniremen were not asked if they could impose the death penalty if aggravating circumstances were proven beyond a reasonable doubt. Although one venireman was asked "Regardless of what the evidence was you would never vote for the death penalty," (T. - 17-18) the court failed to question him further to clarify his "no" (T. 17-18) response, excusing him for cause, even though his "no" response to that question, as a double negative meant that he would vote for the death penalty.[1]

Finally, the questions asked these veniremen as recorded, were too brief and abstract to satisfy the Witherspoon standard.[2] Something more than a few

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1 / In Boulden v. Holman, supra, two jurors clearly responded to questions using the adverb "never".

"THE COURT: You think you would never be willing to inflict the death penalty in any type of case?"
"MR. NELSON: Yes, sir."
"THE COURT: You mean you would never inflict the death penalty on [sic] any case?"
"MR. MOON: That's right." (p. 482, 428 n.6)

In the transcript below where the adverb "never" was used in a question, the "no" response of the veniremen was a double negative. The court construed the response to mean the opposite of its grammatical meaning, excusing the juror for cause. The indicates that the court implied that the veniremen did not know what he was saying or that the court did not understand. This exchange was thus further confused and ambigious. [See the voir dire of Juror supra.]

2 / The exclusion of Mrs. Bankson is included because the objection of defense counsel indicates that she was excluded for her opinions on the death penalty. The murkiness of the record however, does make it difficult to be certain.

10.

perfunctory and mechanical questions is necessary to demonstrate that degree of absolute opposition to the death penalty required for proper exclusion.[3]

In fact, during the voir dire, the court and the District Attorney made statements implying that if the petitioner were found guilty, the jury had no alternative under Georgia law other than to impose the death penalty.[4] These statements confuse the jurors' duty under their oaths.

Even if the court below were correct in finding that only one potential juror was improperly excluded, that in itself would require reversal of the imposition of the death penalty and a remand on sentencing. But the fact is, as the record clearly shows, that a number of veniremen were excused after cursory and constitutionally insufficient questioning.

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3 / In fact, the questions asked these veniremen greatly resemble some of those found insufficient in Maxwell v. Bishop, 398 U.S. 262, (1970), and Boulden, 394 U.S. 478 (1969).

"Q. Do you entertain any conscientious scruples about imposing the death penalty?"
Maxwell, at 264.

"THE COURT: Do you have a fixed opinion against capital punishment?
MR. MOON: Capital punishment.
THE COURT: You mean you would never inflict the death penalty on [sic] any case?"
Boulden, n.6 at 486.

4 / MR. WELDON: Would you consider a lesser punishment for the Defendant?
MR. FLEMING: I don't think that's a proper question.
THE COURT: I don't think so either, Mr. Fleming.
MR. FLEMING: It's a question of law.
THE COURT: That's right.
MR. FLEMING: The Court will charge the jury on what the law is. The only thing we're inquiring here is whether a man is prejudiced or biased.
THE COURT: That's right. Go ahead to some other questions, Mr. Weldon.
MR. WELDON: Yes sir. I'm asking him some questions about the death penalty, your Honor.
THE COURT: Call your next juror, Mrs. Traylor. (T.-9)

4 / con't.
MR. WELDON: He, I think maybe he might be confused, Judge. Now, you see the law is that you can find a fellow guilty and get a light sentence.
MR. FLEMING: (Interrupting.) Wait a minute. Wait just a minute, Mr. Weldon. That is not the law; and, your Honor, we're not supposed to get into a discussion.
THE COURT: No, we're not supposed to get into the law, Mr. Weldon.
MR. FLEMING: We're just suppose to just question the juror.
THE COURT: If you find him guilty, and you would vote for the death penalty, and if you find him not guilty, free him. That's all you're supposed to do. Does he have any bias or opinion and they're not supposed to know the law, Mr. Weldon. (T. - 33.) (Emphasis added.)

II. CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE EXCLUSION OF VENIREMEN IN VIOLATION OF THE MINIMUM STANDARDS SET FORTH IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), IS A DENIAL OF PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In Witherspoon v. Illinois, supra, this Court held that the death penalty cannot be carried out:

> ...if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected. (Id. at 522-523)

In the opinion below, the Georgia Supreme Court decided that the Rule P established by Witherspoon and its progeny is not violated where one potential juror who expresses qualms about capital punishment is improperly excluded. (Opinion below, at 809.) In fact, however, this Court has on more than one occasion reversed a sentence of death for having been unconstitutionally imposed where a single juror was improperly excused. 5 /

5 / The number of jurors improperly excluded has varied from one to forty-seven. Witherspoon v. Illinois, supra [47 excluded]; Boulden v. Holman, 394 U.S. 478 2d (1969) [15 excluded]; Maxwell v. Bishop, 398 U.S. 262 (1970) [several excluded]; Ladetto v. Massachusetts, 356 Mass. 541, 254 N.E. 2d 415 (1969) rev'd 403 U.S. 947 (1971) [3 excluded]; Wigglesworth v. Ohio, 18 Ohio St. 2d 171, 248 N.E. 2d 607 (1969) rev'd 403 U.S. 947 (1971) [1 excluded]; Bernette v. Illinois, 45 Ill. 2d 227, 258 N.E. 2d 793 (1970) rev'd 403 U.S. 947 (1971) [2 excluded]; Speck v. Illinois, 41 Ill. 2d 177, 242 N.E. 2d 208 (1968) rev'd 403 U.S. 946 (1971) [17-50 excluded]; Turner v. Texas, 462 S. W. 2d 9 (Tex. Cr. App. 1969) rev'd 403 U.S. 947 (1971) [6 excluded]; Harris v. Texas, 457 S.W. 2d 903 (Tex. Cr. App. 1970) rev'd 403 U.S. 946 (1971) [1 excluded]; Whan v. Texas, 438 S.W. 2d 918 (Tex. Cr. App. 1969) rev'd 403 U.S. 946 (1971) [1-2 excluded]; Aiken v. Washington, 75 Wash. 2d 421, 452 P. 2d 232 rev'd 403 U.S. 946 (1971) [19 excluded]; Adams v. Washington, 76 Wash. 2d 650, 458 P.2d 558 (1969) rev'd 403 U.S. 947 (1971) [1 excluded]; Mathis v. New Jersey, 52 N.J. 238, 245 A.2d 20 (1968) rev'd 403 U.S. 946 (1971) [3 excluded]; Segura v. Patterson, 402 F2d 249 (10th Cir. 1971) rev'd 403 U.S. 946 (1971) [3 excluded]; Marion

In Marion v. Beto, 434 F2d 29 (5th Cir. 1971) the Court of Appeals for the Fifth Circuit phrased the issue of numbers thusly:

> The bare question here then is whether the improper exclusion for cause of a relatively small number of the total number of veniremen questioned on the grounds of mere conscientious scruples against the death penalty deprives the defendant of the impartial jury required by the Sixth and Fourteenth Amendments. 434 F.2d at 32.

The court reversed and remanded the case, finding that:

> ...one improperly excluded juror may mean the difference between life or death for a defendant. Although a defendant certainly has no assurance that a properly empanelled jury will not impose the death penalty, it seems to us that in light of the vast difference in treatment which may result from the improper exclusion of a single venireman, even that degree of error is prejudicial to the rights of a defendant in a capital case. (Emphasis added.) Id., at 32.

The fact that three of the eight or nine death-scrupled veniremen in the instant case were allowed to remain on the venire is irrelevant to the issue of whether the petitioner's rights were violated by the improper exclusion of the other death-scrupled veniremen. 6/

The court below relies on its finding that there was no systematic exclusion of a qualified group of jurors. But even accepting that as true this petitioner was none the less stripped of constitutional guaranties by the improper exclusion of individual jurors. Harris v. Texas,

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5 /con't. v. Beto, 434 F.2d 29 (5th Cir. 1971) [3 excluded]; Woodards v. Maxwell, 303 F. Supp. 690 (S.D. Ohio 1969) [2 excluded]; People v. Schader, 457 P.2d 841 (Cal. 1969) [1 excluded]; Simmons v. State, 226 Ga. 110, 172 SE 2d 680 (1970) [2 excluded]; Miller v. State, 224 Ga. 627, 163 SE 2d 730 (1969) [2 excluded].

6 / Bernette v. Illinois, 45 Ill. 2d 227, 258 N.E 2d 793 (1970) rev'd 403 U.S. 947 (1971); Whan v. Texas, 438 S.W. 2d 918 (Tex. Cr. App. 1969) rev'd 403 U.S. 946 (1971); Marion v. Beto, supra; People v. Schader, 457 P. 2d. 841 (Cal. 1969).

457 S.W. 2d 903 (Tex. Cr. App. 1970); Aiken v. Washington, 75 Wash. 2d 421, 452 P.2d 558 (1969) rev'd 403 U.S. 947 (1971); Adams v. Washington, 76 Wash. 2d 650, 458 P.2d 558 (1969) rev'd 403 U.S. 947 (1971); Mathis v. New Jersey, 52 N.J. 238, 245 A. 2d 20 (1968) rev'd 403 U.S. 946 (1971); Marion v. Beto, supra.

Nor does the fact that the state could have removed all death-scrupled veniremen by its peremptory strikes rectify the denial of petitioner's rights. 7/ Speck v. Illinois, 41 Ill. 2d 177, 242 N.E. 2d 208 (1968) rev'd 403 U.S. 946 (1971); Bernette v. Illinois, supra; Mathis v. New Jersey, supra; Wigglesworth v. Ohio, 18 Ohio St. 2d 171, 248 N.E. 2d 607 (1969) rev'd 403 U.S. 947 (1971); Whan v. Texas, supra.

The Court should therefore grant review here to decide whether veniremen who were excluded from the jury in petitioner's trial because of their scruples about the death penalty were eliminated in violation of the constitutionals rights to a fair and impartial jury and due process of law.

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7 / Whether any of the three unexcused death-scrupled veniremen were included in petitioner's jury after the process of striking is impossible to discern from the record. (Appendix C, voir dire transcript)

III CERTIORARI SHOULD BE GRANTED BECAUSE THE INADEQUACY OF THE TRANSCRIPT INFRINGED UPON THE PETITIONER'S RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL AND DUE PROCESS OF LAW GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The necessity of an adequate and complete transcript of trial proceedings to the effective assistance of counsel is settled in both Georgia and Federal law. See Chessman v. Teets 354 U.S. 156 (1957); See Owens v. State 233 Ga. 869 (1975); Ga. Code Ann. §6-805(d) (1965).

Chessman dealt with the completion of an incomplete trial transcript following the death of the original court reporter. Mr. Justice Harlan speaking for the five members of the court[8/] held that the defendant was unconstitutionally denied representation at settlement conferences to complete the transcript despite a waiver of appointed counsel at the trial itself. Chessman at 162-163.

> "Under the cirsumstances which have been summarized, we must hold that the ex parte settlement of this state court record violated petitioner's constitutional right to procedural due process. We think the petitioner was entitled to be represented throughout those proceedings either in person or by counsel. (Cases cited) Id.,

The importance of a correct transcript under such circumstances had been recognized by California Statute in that the California Civil Procedure Code empowered the trial judge to set aside the judgment and order a new trial when death or disability of a court reporter made the making of a trial transcript impossible. Chessman n.7 at 158, n.9 at 162. Although this statute did not apply in criminal

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Mr. Justice Douglas dissented, joined by Mr. Justice Clark:

> "I agree with the general principle announced by the Court. But I think it is misapplied here."

Mr. Justice Burton dissented similarly and Chief Justice Warren did not participate in the decision. Chessman at 169.

cases, Justice Harlan suggested that California would logically place at least equal importance on transcripts in a criminal trial.[9/]

The Petitioner contends that this Court places a similar importance on the adequacy and completeness of a voir dire transcript where veniremen are admittedly excluded for scruples about the imposition of the death penalty. Clearly had the voir dire transcript in Witherspoon Boulden and Maxwell been inadequate for proper review, that in itself would have denied those defendants due process by preventing this Court from determining where specific abuses had occurred.

The Georgia Supreme Court should have found that the voir dire transcript and the Trial Court's Order amending it were constitutionally and statutorily deficient. That court ignored its own statutes and case law as well as Federal law in holding that the Davis trial transcript was adequate for review. (Opinion below, at 807) A careful examination for the voir dire transcript shows frequent and material deliberate omissions, as well as considerable confusion in the transcription. The entire voir dire (Transcript, 1-43) as well as the state's "Motion to Correct Transcript" (Record, 106), a pertinent affidavit from the defense attorney at trial and the Trial Court's Order amending the voir dire transcript (Record, 108-109) are

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> "...However, it is obvious that if the reporter's transcript is so important as to give the court such power in a civil case, a fortiori it must have such importance in a criminal case in which, on the evidence to be transcribed, the accused is sentenced to death. Likewise its importance is emphasized by the California law making the appeal automatic from death sentences. California Penal Code, §1239(b)". Chessman n.9 at 162.

attached as Appendix C, p.p.1-47.

> The Georgia Code required that all ... proceedings which may be called in question on appeal or other post-trial procedure shall be reported, and where the report is transcribed, all such matter shall be included in the written transcript, it being the intention of this law that all these matters appear in the record... Ga. Code Ann. §6-805(d) (1965).

The trial court recognized the inadequacy of the voir dire transcript by respectively moving on July 25, 1975 (Appendix C, p.44 c attached) and ordering on August 8, 1975 (Appendix C, p. 45c - 46c attached) a general correction in an attempt to deal with Petitioner Davis's challenge to the voir dire and its transcription.[10]

10/

"11.

The Court erred in issuing its order of August 8, 1975, which attempts to correct the transcript in this case inasmuch as the same is in violation of the law as set forth in the case of Owens vs. The State, 233 Ga. 869, decided February 12, 1975.

12.

The Court erred in issuing its order of August 8, 1975 inasmuch as it is not a "correction" of the transcript, but is in effect a rewriting of the transcript, the court reporter having no notes other than as originally transcribed, said notes being the highest and best evidence of the proceedings.

13.

The provisions of Section 6-805 of the Georgia Code Annotated does not diminish the requirement that all proceedings be transcribed in this matter."
(Emphasis added). (pp 3-4, Brief of Appellant before Supreme Court of Georgia below)

In Owens v. State, 233 Ga. 869 (214 SE 2d 173) (1975) the Georgia Supreme Court upheld a trial court's denial of a state motion to amend a transcript, incomplete as to the Witherspoon voir dire, stating that:

> A post-trial examination of lawyers and court officials, or of excluded veniremen, would not be a satisfactory means for this court to perform its review function.
>
> We hold that failure to record the Witherspoon voir dire in a case in which the sentence of death is imposed, is reversible error. We therefore reverse the judgment in this case insofar as it imposed the death sentence and remand it to the trial court for a new trial on the question of the sentence. Horton v. State, 228 Ga. 690 (187 SE2d 677); Cash v. State, 231 Ga. 285 (201 SE2d 625); Ross v. State, 233 Ga. 161, supra. Owens, at 873-874.

In this instance, the Georgia Supreme Court attempted to distinguish Owens as inapplicable by using a later case, Coker v. State 234 Ga. 555 (1975) where a supplementation of the trial transcript had been allowed. Coker however made clear that its rule was inappropriate and that Owens controlled where veniremen were excluded because of opposition to the death penalty. The Court there said:

> The Owens case is clearly limited to situations where veniremen are excused because of opposition to the death penalty and the death penalty is subsequently imposed.
>
> In the present case a judgment of the trial judge on motion to correct the transcript pursuant to Code Ann. §6-805(f) reflects: "no prospective juror was excused on the basis of being conscientiously opposed to capital punishment, but he did not receive an affirmative answer from a single juror, and therefore the court did not excuse or disqualify a prospective juror on the grounds they were opposed to capital punishment."
>
> No prospective jurors having been excused on the ground of opposition to capital punishment, we conclude this enumeration is without merit. Coker at 566-67.

The court below misapplied its own cases in derogation of Petitioner's constitutional rights in failing

to overturn and remand the sentencing phase of the trial. The discent below of Justice Ingram joined by Chief Justice Nichols pointed to this error. 11/

As the voir dire transcript reveals, the questioning of individual veniremen is no where completely transcribed. (See Appendix C) By failing to reach the issue of the transcript's inadequacy the court below engaged in a presumption that the Witherspoon voir dire was properly conducted. The petitioner contends that such a presumption is constitutionally impermissable in a case where a death sentence may be imposed. It gives the court reporter an impermissible latitude to determine what is to be recorded as well as transcribed. All of the voir dire should have been recorded and a transcript made of those jurors who were excused.

This Court should grant this petition for certiorari to determine whether the Georgia Supreme Court' failure to overturn the imposition of the death sentence because the transcription of the voir dire is incomplete was unconstitutional. Further this Court should decide whether the rationale of Chessman applies here so that the supplementation of the voir dire transcript was an unconstitutional denial of due process.

11/

"In my judgment, Simmons and Owens control the present case." (Opinion below, at 814)

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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